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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HCA HEALTH SERVICES OF TEXAS, INC.
d/b/a Spring Branch Medical Center,

Petitioner,

vs.

KELVIN WASHINGTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a court assess an individual's condition without regard to any mitigating measures when determining whether that individual is "disabled" under the ADA?

STATEMENT PURSUANT TO RULE 29.6

Respondent is HCA Health Services of Texas, Inc. d/b/a Spring Branch Medical Center. Respondent's parent corporation is Columbia/HCAHealthcare Corporation. Respondent has one nonwholly owned subsidiary, which is Columbia/HCA of Houston, Inc.

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Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Dated September 3, 1998 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The Southern District Of Texas Dated February 7, 1997 ..... 17a

HCA Health Services of Texas, Inc. d/b/a Spring Branch Medical Center (the "Hospital" or "Petitioner") respectfully requests that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit entered on September 3, 1998. The Fifth Circuit affirmed the Order of the United States District Court for the Southern District of Texas denying the Hospital's Motion for Summary Judgment.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 152 F.3d 464, and is reproduced in the Appendix at 1a. The Order of the United States District Court for the Southern District of Texas is reproduced in the Appendix at 17a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 1997. (Appendix 1a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES AND REGULATIONS INVOLVED

Section 3(2) of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (1994), provides:

> (2) Disability. The term "disability" means, with respect to an individual —
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Section 1630.2(j) of the 1990 Regulations to the Americans with Disabilities Act at 29 C.F.R. § 1630.2(j) (1997), provides in pertinent part:

(j) Substantially limits —

(3) With respect to the major life activity of working —

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also

disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

EEOC Interpretive Guidance for § 1630.2(j), 29 C.F.R. § 1630, App. § 1630.2(h) & (j) (1997), provides in pertinent part:

(h) . . . The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. See Senate Report at 23, House Labor Report at 52, House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid. . . .

(j) . . . The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. . . .

STATEMENT OF THE CASE

Respondent Kelvin Washington is an accountant who worked for the Petitioner Hospital until his position was eliminated during a reduction in force. Washington has a condition known as Adult Still's Disease. Adult Still's Disease is a degenerative rheumatoid condition that affects his bones and joints. It is undisputed that this condition, when unmedicated, renders Washington bedridden and unable to work.

Washington is able to control the effects of his disease through medication. On June 7, 1993, while Washington was still employed, an attorney representing Washington provided the Hospital's Director of Human Resources with a letter requesting that Washington be given a new job at the Hospital or that his work hours be modified. However, Washington later testified in his deposition that his medical condition was largely controlled by medication and, with such medication, his only limitation was that he could work no more than ten hours per day for five consecutive days.

Washington initially filed his suit against the Hospital on April 13, 1994. The suit was filed in Texas state court, but the Hospital removed the case to the United States District Court for the Southern District of Texas, Houston Division. The Hospital filed a motion for summary judgment on March 17, 1995, claiming that it had a nondiscriminatory reason for terminating Washington's employment. The district court granted the Hospital's motion on May 18, 1995. Washington filed a motion for new trial, which was denied. Washington appealed the denial of motion for a new trial. The Fifth Circuit reversed the summary judgment, finding a triable issue of fact regarding the Hospital's motive for laying off Washington, and remanded the case to the district court.

On remand, the Hospital filed another motion for summary judgment, arguing that Washington was not "disabled" under the ADA since his condition was and is controlled by medication. The district court denied the Hospital's motion for summary judgment, finding that the determination as to whether Washington has a disability must be made without regard to the mitigating effects of his medication. However, the district court found that this issue involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The district court therefore certified this question for appeal to the Fifth Circuit pursuant to 28 U.S.C. § 1292(b).

On appeal, the Fifth Circuit sharply questioned the EEOC Interpretive Guidelines. The court noted that the Tenth and Sixth Circuits had refused to follow the EEOC Guidelines and had held that a person should be evaluated in his or her medicated state. The Fifth Circuit stated that it found it much more reasonable to take mitigating measures into account. However, the Fifth Circuit also found that its position was not so much more reasonable as to warrant overruling the EEOC Interpretive Guidelines. The Fifth Circuit therefore adopted an alternative method of analysis, holding that only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history would be considered in their unmitigated state. The court emphasized the narrowness of this holding by further stating that if an individual has a permanent correction or amelioration, such as an artificial joint or a pin or a transplanted organ, that individual must be evaluated in his mitigated state. The court then analyzed Washington and found that his Adult Still's Disease was sufficiently analogous to the ailments contemplated in the EEOC Guidelines such that mitigating measures should not be taken into account when assessing whether he is "disabled" for purposes of the ADA. The court then affirmed the district court's denial of the Hospital's Motion for Summary Judgment.

REASONS FOR GRANTING THE WRIT

The decision below adds to the confusion surrounding this area of law. Currently, two circuits, the Tenth and the Sixth, have rejected the EEOC Interpretive Guidelines and held that mitigating measures should not be taken into account in analyzing disabilities under the ADA. The Third and Eleventh Circuits have followed the EEOC Interpretive Guidelines and held that mitigating measures should be taken into account in analyzing disabilities under the ADA. The First, Seventh and Eighth Circuits have inconsistent rulings even within their circuits, with some district courts analyzing plaintiffs in a medicated state and other district courts analyzing plaintiffs in an unmedicated state. The Fifth Circuit has not adopted either line of reasoning, instead creating a new method of analysis. In short, the Fifth Circuit indicates that it will follow the EEOC Guidelines in some cases, but not in others. This attempt to create a "case by case" middle ground is useless in resolving the split between the circuits and will only create endless corollary litigation. Because the Fifth Circuit's opinion further confuses the law in this area, this Court should grant the Hospital's Petition for Certiorari.

I.

THE FIFTH CIRCUIT'S CREATION OF A NEW METHOD OF ANALYSIS EXACERBATES THE CONFLICT IN THIS AREA OF LAW.

A. The Fifth Circuit's creation of an alternative method of analysis will result in additional and unnecessary litigation.

Prior to the Fifth Circuit's decision in this case, the circuits had split on the issue of whether a court must assess an individual's condition with or without regard to mitigating measures when determining whether that individual is "disabled" under the ADA.[1]

1. *See Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997) (holding that the EEOC Guidelines are contrary to the plain

(Cont'd)

The Fifth Circuit acknowledged the split, and then proceeded to compound the confusion by creating a new and unprecedented approach to the definition of "disability" under the ADA.

The Tenth and Sixth Circuits recognized that the plain language of the ADA obviates the need for an analysis of the legislative history or EEOC Guidelines. *Sutton v. United Airlines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997); *Gilday v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir. 1997). These courts recognize that by evaluating an individual in his or her medicated state, the court is not required to engage in guess work regarding the individual's health. The other circuits that have addressed this issue have found that the plain language is not so clear. These courts have ruled that they must look to the legislative history and the EEOC Guidelines and that such authority dictates that an individual must be evaluated in a medicated state. *Arnold v. United Parcel Service*, 136 F.3d 854 (1st Cir. 1998) (holding that disabilities must be analyzed without regard to medications, prostheses, or other possible corrective measures); *Matzack v. Frankford Candy and Chocolate Co.*, 136 F.3d 933 (3rd Cir. 1997) (same), *cert denied*, 118 S. Ct. 693 (1998); *Harris v. H & W. Contracting Co.*, 102

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language of the ADA and that mitigating measures, such as eyeglasses, must be taken into account when determining whether an individual is disabled); *Gilday v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir. 1997) (holding that disability determinations should be made in light of the effect of medications or other corrective measures); *compare with Arnold v. United Parcel Service*, 136 F.3d 854 (1st Cir. 1998) (holding that disabilities must be analyzed without regard to medications, prostheses, or other possible corrective measures); *Matzack v. Frankford Candy and Chocolate Co.*, 136 F.3d 933 (3rd Cir. 1997) (same), *cert denied*, 118 S. Ct. 693 (1998); *Harris v. H & W. Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996) (holding that disabilities must be assessed without regard to mitigating measures).

F.3d 516, 520-21 (11th Cir. 1996) (holding that disabilities must be assessed without regard to mitigating measures.)[2]

It its opinion, the Fifth Circuit reviewed the decisions from the Tenth and Sixth Circuits and stated that these cases offer the most reasonable reading of the ADA. The court also noted, however, that it could not ignore the legislative history and the EEOC Guidelines that dictate the opposite result. Instead of choosing one side of this conflict, the Fifth Circuit attempted to avoid this stark choice by creating a third alternative. The Fifth Circuit held that only serious impairments that are analogous to those mentioned in the EEOC Guidelines and the legislative history will be considered in their unmitigated state. The impairments must be serious "in common parlance" and must require that the individual use mitigating measures on a frequent basis, such as putting on a prostheses every morning or taking medication with some continuing regularity. Further, if an individual has a permanent correction or amelioration, such as an artificial joint, pin, or transplanted organ, that individual must be evaluated in his mitigated state. The Fifth Circuit concluded its opinion by stating that it was joining, to a limited extent, the circuits that have followed the EEOC Guidelines and held that a disability must be asserted without regard to mitigating measures.

It is clear that the Fifth Circuit's opinion and suggested methodology is fraught with the specter of endless and needless litigation. Litigation will ensue over whether an impairment is

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2. Four other circuits simply cite the EEOC's interpretive guidance or the legislative history without discussing the underlying issue. *Bartlett v. New York State Board of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998); *Baert v. Euclid Beverage, Ltd.*, 149 F.3d 626 (7th Cir. 1998); *Doane v. City of Omaha*, 115 F.3d 674 (8th Cir.), *cert. denied*, 118 S. Ct. 693 (1997); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1349 (1997).

"serious" or "permanent," whether an individual's medication regime is sufficiently frequent to constitute a serious impairment, or whether the impairment is considered serious "in common parlance." Further, the Fifth Circuit will have to clarify in later opinions just how narrow its holding is, and the extent of its difference from other circuits. In order to prevent such needless litigation on these corollary issues, this Court should grant this petition.

B. By Creating a Third Alternative, the Fifth Circuit has Further Added to the Confusion Regarding the Deference to be Given to the Agency's Guidelines.

In its opinion, the Fifth Circuit created its own methodology for determining whether an impairment is sufficiently "serious" to constitute a disability. This alternative approach further confuses the existing conflict in the circuits regarding the amount of deference to be given to the EEOC Guidelines.

The division in the circuits focuses on the necessity, if any, and the extent to which a court must look to the Interpretative Guidelines in order to determine what constitutes a "disability" under the ADA. This Court has held that such interpretative guidelines are not entitled to the high degree of deference that is accorded to regulations promulgated pursuant to the notice and comment rules set forth in the Administrative Procedure Act, 5 U.S.C. § 552 (1994). *Chevron U.S.A. v. Natl. Resources Inc.*, 467 U.S. 837, 842-43 (1984); *see Batterton v. Francis*, 97 S. Ct. 2399, 2405 n.9 (1977) ("[A] court is not required to give effect to an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations."); *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 65 (1986) (stating that interpretative guidelines are not necessarily binding upon courts but rather "constitute a body of experience and knowledge to which courts and litigants may properly resort to

for guidance." (quoting *General Elec. Co. v. Gilbert,* 429 U.S. 125, 141-42)). Following the language in *Chevron,* some courts have held that the EEOC Guidelines are not entitled to any deference. These courts have held that the plain language of the statute controls. *Hodgens v. General Dynamics Corp.,* 963 F. Supp. 102 (D.R.I. 1997), *aff'd,* 144 F.3d 151 (1st Cir. 1998); *Murphy v. United Parcel Service, Inc.,* 946 F. Supp. 872 (D. Kan. 1996), *aff'd,* 141 F.3d 1185 (1996). The court in *Hodgens v. General Dynamics Corp.,* 963 F. Supp. 102 (D. R.I. 1997), expressly addressed this issue, stating:

> It is difficult to see how a condition that has been ameliorated so that it does not affect an individual's ability to function normally can be construed as an "impairment". It is even more difficult to see how such a condition could be one that "substantially limits" a major life activity. The use of the present tense in the term "substantially limits" unambiguously connotes the requirement of a real and existing limitation as opposed to a hypothetical one. If Congress intended to require only that a condition "could substantially limit" a major life activity if left unattended, Congress easily could have said that.

Id. at 107. The court then concluded that

> [i]n the absence of any indication that Congress intended the determination of disability to be based upon what an individual's ability to function might be if he abandoned reasonable treatment measures, the plain language of the statute requires that the determination be based upon the individual's actual ability to function, taking into account the ameliorative effects of medication.

Id.

A number of other courts agree that the plain language of the statute requires analysis of the plaintiff's actual ability to function taking into account ameliorative measures, including medication. Rather than engaging in speculative exercises to determine the potential limitations the individual may have, these courts have looked at the plaintiff in his or her current condition.[3]

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3. *See, e.g., Zirpel v. Toshiba America Information Systems,* 111 F.3d 80 (8th Cir. 1997) (evaluating plaintiff, who suffered from panic disorder and concurrently received treatment, in her existing state and finding that she had not created a triable dispute as to whether she was substantially limited in any of her major life activities); *Murphy v. United Parcel Service*, 946 F. Supp. 872 (D. Kan. 1996) (holding plaintiff whose high blood pressure was controlled by medication was not disabled); *Gilday v. Mecosta Cty.*, 124 F.3d 760 (6th Cir. 1997) (plaintiff with diabetic mellitus which was controlled by medication was not substantially limited); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1444-45 (W.D. Wis. 1996) (plaintiff required to show that her diabetes substantially limited her by showing that it affects her in fact, rather than how it would affect her hypothetically if she were unable to obtain insulin); *MacDonald v. Presbyterian Hospital,* 5 AD Cases 315 (S.D.N.Y. 1996) (analyzing plaintiff in her current state and finding that since plaintiff's condition could be controlled with medication and did not therefore limit her work performance in any way, she had not stated a claim for relief); *Moore v. City of Overland Park,* 6 AD Cases 469 (D.Kan. 1996) (evaluating plaintiff's diabetes in her medicated state and finding that she had not shown that she was substantially limited in her activities); *Sweet v. Electronic Data Systems, Inc.*, 1996 WL 204471, *5 (S.D.N.Y. 1996) (holding that plaintiff's eyesight was not substantially limited where his vision was perfect in one eye and correctable to 20/80 in the other eye); *Joyce v. Suffolk County,* 911 F. Supp. 92, 95 (E.D.N.Y. 1996) (holding that an applicant for a position as a police officer whose uncorrected vision in each eye was 20/200, but whose corrected vision in each eye was 20/20, was not "disabled" under the ADA); *Hendry v. GTE North*, 896 F. Supp. 816, 824 (D. Ind. 1995) (evaluating plaintiff with migraines in medicated state); *Chandler v. City of Dallas,* 2 F.3d 1385, 1391 (5th Cir. 1993) (rejecting plaintiff's

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The Tenth and the Sixth Circuits have found that the EEOC Interpretative Guidelines are not entitled to the same level of deference as properly promulgated rules. *Sutton,* 130 F.3d at 902. (Stating that "while the EEOC's Interpretative Guidance may be entitled to some consideration in our analysis, it does no carry the force of law and is not entitled to any special deference under *Chevron.*") *Gilday,* 124 F.3d at 767-68 (stating that the "EEOC is creating a different standard for persons who take medication for their condition. This conflicts with the plain reading of the statute.")

Other courts have applied *Chevron* and found, in diametrically opposed rulings, that they would have to follow the EEOC's guidance. *Harris v. H & W Contracting Co.,* 102 F.3d at 521; *Wilson v. Pennsylvania State Police Dep't,* 964 F. Supp. 898, 903-05 (E.D. Pa. 1997).

Still other courts have determined that there are other levels of deference that must be paid to the EEOC Guidelines. *Matczak,* 136 F.3d 935 (stating that the EEOC Guidelines do not command the same deference as the underlying regulations, but that courts must nonetheless give the EEOC's Guidelines controlling weight). The First and Eighth Circuits have not given the EEOC Guidelines controlling weight, but some lower yet significant level of deference. *Arnold,* 136 F.3d at 866; *cf. Olson v. Dubuque Community School District,* 137 F.3d 609, 612 (8th Cir. 1998) (EEOC enforcement guidance entitled to deference). Still other courts have simply stated that they will

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claim under the Rehabilitation Act that the fact that his vision, when corrected, allowed him only 20/60 vision rendered him handicapped.); *EEOC v. Union Carbide Chem. & Plastics,* 4 AD Cases 1409 (E.D. La. 1995) (relying on *Chandler* and finding that plaintiff's bipolar disorder should be evaluated in his medicated condition in determining "disability" under the ADA).

analyze an individual without regard to mitigating measures, without any analysis of the EEOC Guidelines. *Bartlett v. New York State Board of Law Examiners,* 156 F.3d 321 (2nd Cir. 1998); *Holihan v. Lucky Stores, Inc.,* 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied,* 117 S. Ct. 1349, 137 L. Ed. 2d 5067 (1997).

Finally, some circuits disagree even within their ranks regarding the amount of deference to give the EEOC Interpretive Guidelines. In *Arnold v. United Parcel Service,* 136 F.3d 854 (1st Cir. 1998), the First Circuit analyzed the EEOC Interpretive Guidelines and found that it was required to analyze an individual in his or her unmedicated state.[4] Three months later, however, the First Circuit affirmed the district court of Rhode Island's opinion in *Hodgens v. General Dynamics Corp.,* 963 F. Supp. 102 (D.R.I. 1997), which explicitly held that the EEOC Interpretive Guidelines were contrary to the plain language of the statute.[5]

In *Baert v. Euclid Beverage Corp.,* 149 F.3d 626, 629 (7th Cir. 1998), the Seventh Circuit did not analyze the EEOC Interpretive Guidelines in determining that an individual should be analyzed without regard to mitigating measures. However, the Wisconsin district court had provided an exhaustive analysis

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4. It is worth noting that the First Circuit in *Arnold* reached the opposite conclusion from the Tenth Circuit in *Murphy v. United Parcel Service, Inc.*, 946 F. Supp. 872 (D. Kan), *aff'd*, 141 F.3d 1185 (1996). *Murphy* rejected the EEOC Interpretive Guideline and found that an individual should be evaluated in his or her medicated state. United Parcel Service, Inc., a national employer, must now comply with two different standards in two different jurisdictions. Given the immense numbers of national employers that will be similarly affected, this Court must address the proper level of deference to be given to merely interpretive guidelines.

5. *See* discussion at pp. 10, *infra.*

of the conflict between the EEOC Guidelines and the statutory language of the ADA. The district court in *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996), explicitly found that the EEOC Guidelines were not entitled to any deference. In contrast, the District Court for the Middle District of Illinois, after noting that it was impossible to tell from *Roth v. Lutheran Hospital*, 57 F.3d 1446 (7th Cir. 1995) (a predecessor case to *Baert*) whether the Seventh Circuit would endorse the guidelines as a permissible interpretation of the ADA, adopted the EEOC Guidelines without analysis. *Erjavac v. Holy Family Health Plus*, 13 F. Supp. 2d 737 (M.D. Ill. 1998). Similarly, the Eighth Circuit in *Doane* merely found that while the plaintiff's brain had mitigated the effects of his impairment the court would not consider such mitigation. *Doane*, 115 F.3d 624 (9th Cir. 1997). There was no discussion or analysis of the EEOC Interpretive Guidelines. This lack of guidance regarding the import of the EEOC Interpretive Guidelines has caused two Eighth Circuit district courts, in cases decided after *Doane*, to reach opposite results. *Compare Wilking v. County of Ramsey*, 983 F. Supp. 848, 854 (D. Minn. 1997) (stating that "[t]his Court agrees that the EEOC's interpretation is in direct conflict with the language of the statute") *with Smith v. Horton Industries*, 1998 WL 702325 (D. S.D. 1998) (stating that it was bound by the Eighth Circuit to give deference to the EEOC Guidelines although it agreed with the rationale of the Tenth Circuit). *See also Zirpel v. Toshiba American Information Systems, Inc.*, 111 F.3d 80 (8th Cir. 1997) (affirming decision analyzing plaintiff in medicated state).

The existing and ever increasing confusion regarding the amount of deference, if any, that should be given to the EEOC Interpretative Guidelines begs this Court to clarify the issue. The Fifth Circuit further compounds this confusion, as its opinion simultaneously adopts and rejects the Interpretative Guidelines. The Fifth Circuit attempts to strike a middle ground,

as, in reaching its "limited holding" it states that it must give "more than minimal deference" to the EEOC Interpretative Guidelines. However, the opinion also provides that it will evaluate individuals with a "permanent" correction, such as "an artificial joint or a pin or a transplanted organ" in a mitigated state. This appears to contradict the portion of the EEOC Guideline which reads that "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices."[6] Under the language of the EEOC Guidelines, a joint or pin or transplanted organ would appear to be an assistive or prosthetic device. However, the Fifth Circuit, while claiming to give the EEOC Guidelines more than minimal deference, appears to have redefined what constitutes an assistive or prosthetic device. Under the Fifth Circuit's rationale, a permanent assistive or prosthetic device ceases to qualify an individual for "disability" status, while a frequently used assistive or prosthetic device will qualify that same individual for consideration for "disability" status. The Fifth Circuit's lip service to deference to the Guidelines while indirectly redefining the terms of the Guidelines further contributes to the confusion surrounding the proper amount of deference to be given to the Guidelines.

The confusion among the circuits as to how much deference the EEOC Guidelines are entitled to is clear. Applying the same cases, the circuits have covered every alternative from finding that the EEOC Guidelines are not entitled to any deference to finding that they carry controlling weight, regardless of their status as merely interpretative guidelines. This Court must clarify the amount of deference due to a merely interpretative guideline.

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6. 29 C.F.R. Pt. 1630 App. 1630.2(h).

C. Even the Minimal Amount of Deference Afforded to the EEOC Guidelines by the Fifth Circuit Would Render Other Sections of the Statute Moot.

The Fifth Circuit did not explicitly address the Hospital's additional argument that reliance on the Interpretive Guidelines would render other sections of the statute moot. The Fifth Circuit stated in its opinion that it must give "more than minimal deference" to the EEOC Guidelines. However, *any* deference given to the guidelines renders the third prong of the statute's "disability" analysis moot. The statute provides for three methods of showing "disability."[7] The third definition allows an individual to establish that he is "disabled" if he is "regarded as having" a substantially limiting impairment. 42 U.S.C. § 12102(2)(c).

The EEOC's "interpretive guidelines" suggest that this alternative definition of the term "disability" is intended to apply in situations where the employee is not substantially limited, but the employer treats the employee as though he is. The "guidelines" provide:

> An individual satisfies the first part of the definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

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7. Throughout the course of this litigation, Washington has relied solely on the first part of the definition of "disability."

29 C.F.R. § 1630, App. § 1630.2(l). This portion of the guidelines, § 1630.2(l), is inconsistent with the portion of the guidelines discussed previously at app. § 1630.2(j) which states that an individual should be evaluated without regard to any mitigating measures such as medicine. Section 1630.2(j) concludes that an individual with controlled high blood pressure remains substantially limited despite the medication. If § 1630.2(j) is given effect, the employee would be evaluated as though the blood pressure was not controlled. Therefore, there would be no need to inquire as to whether the employer "regarded" him as disabled, because, if the employee could rely on the fact that he would be "substantially limited" despite his treatment, the employee would have already established that he was disabled. *See Murphy v. United Parcel Service,* 946 F. Supp. 872 (D. Kan.), *aff'd,* 141 F.3d 1185 (1996).

The court in *Murphy v. United Parcel Service,* the only case to have addressed this point directly, found that the conflict created a situation where the third definition of "disability" would be rendered superfluous. In *Murphy,* the plaintiff, who had controlled high blood pressure, argued that his disability determination should be made without regard to the medication. *Id.* In analyzing the plaintiff's claim, the court explicitly noted that the two sections of the "guidelines" were in conflict and stated:

> Under § 1630.2(j) of the EEOC's interpretative guidelines, a person's unmedicated high blood pressure would constitute a disability. Yet, the interpretative guidelines in § 1630.2.(l) implicitly suggest that a person who has controlled his blood pressure by medication does not have a disability; if this were not so, why would a person suffering from high blood [sic] ever have to look to the

> "regarded as" section of the ADA to prove the existence of a disability?

Id. at 880.

The *Murphy* court then rejected the guideline at app. § 1630.2(j) both due to its conflict with the other "interpretative guideline" and because the court found that an individual with an illness controlled by medication did not have a disability under the ADA. *Id.*

It is clear that both of these provisions of the "interpretative guidelines" cannot be given effect due to the inherent conflict between them. Nor does the Fifth Circuit opinion address this problem. If a plaintiff is examined without regard to any mitigating measures, there is no need for the third definition of disability, because the plaintiff will be considered "disabled" under the statute and there will be no need to look at how the plaintiff is regarded by his employer. The Fifth Circuit's opinion would result in some individuals being analyzed in an unmedicated state and some in a medicated state, depending on the "seriousness" or "permanence" of his or her impairment. The Fifth Circuit's opinion would read out the third prong of the statute for individuals who were evaluated in an unmitigated state, while leaving the third prong intact for individuals evaluated in a medicated state. This would clearly cause inconsistent results and further confuse the law in this area.

D. Even if Washington is Evaluated in His Unmedicated State and Considered Disabled, He is Not Qualified for the Position with the Hospital.

Even if this Court determined that Washington should be evaluated in his unmedicated, hypothetical condition, he would not be able to produce evidence of the second element of a

prima facie case (*i.e.*, that he was a "qualified individual"). Washington stated in his deposition that: "[w]ithout this medication, I would not be able to work at all, and I would be confined to bedrest, unless my condition was in remission."

It is well settled that an individual must be able to come to work to be a "qualified individual" under the ADA. *Rogers v. International Marine Terminal, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) ("Because Rogers could not attend work, he is not a 'qualified individual with a disability' under the ADA. As several courts have recognized, '[a]n essential element of any . . . job is an ability to appear for work . . .' "); *cf., Leatherwood v. Houston Post Co.*, 59 F.3d 533, 537 (5th Cir. 1995). Since Washington, by his own admission, would not have been able to attend work and would have been confined to bedrest, he would not have been able to satisfy the second element of the *prima facie* case which requires that he be qualified to perform the job. *See Howard v. North Mississippi Medical Center*, 939 F. Supp. 505, 509 (N.D. Miss. 1996) (stating that "[s]hould the court agree with [the plaintiff] that being confined to one's bed at the onset of a migraine headache is indeed substantially limiting, the court would be obligated to find that the confinement renders her not a qualified individual under the Act.")

It has also been stated

> that when an employee knows that he is afflicted with a disability, needs no accommodation from his employer, and fails to meet "the employer's legitimate job expectations," due to his failure to control a controllable disability, he cannot state a cause of action under the ADA.

Siefken v. Village of Arlington Heights, 65 F.3d 664, 667 (7th Cir. 1995). Because Washington cannot show that he is able to

work in an unmedicated state, he is not qualified to resume his position with the Hospital.[8]

CONCLUSION

The Fifth Circuit's opinion adds to the confusion surrounding the proper interpretation of and amount of deference to be given to the EEOC's Interpretive Guidelines. As discussed in this Petition, the Fifth Circuit's attempt to strike a middle ground would only create endless corollary litigation. Nor does it resolve the proper amount of deference to be given the EEOC Interpretive Guidelines, an issue on which the Circuits are completely split. Finally, the Fifth Circuit's opinion does not address, much less resolve, the fact that deference to the EEOC Interpretive Guidelines renders the third prong of the statute moot. In order to resolve these issues, this Court should grant the Hospital's Petition for Certiorari.

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8. Further, Washington cannot show that he is qualified to work even if he is analyzed in a medicated state. Several courts have held that a plaintiff who cannot work more than forty hours a week is not otherwise qualified for the position. *Tardie v. Rehabilitation Hospital of Rhode Island*, 6 F. Supp. 2d 125, 130 (D. R.I. 1998) (plaintiff's contention that she suffers from an impairment limiting her to not working more than forty hours a week "is without merit"); *Ellis v. Mohenis Services, Inc.*, 1998 WL 564478 at 4 (E.D. Pa. Aug. 24, 1998) (same); *Kolpas v. G.D. Searle & Co.*, 959 F. Supp. 525, 529 (N.D. Ill. 1997); *see also Duff v. Lobdell-Emery Mfg. Co.*, 976 F. Supp. 799, 808 (N.D. Ind. 1996) (finding that impairment that renders person incapable of working more than forty hours per week not a disability under the ADA); *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454-55 (7th Cir. 1995) (ruling where plaintiff had visual condition which prevented working from more than eight to ten hours straight his inability to fulfill long shifts or 36-hour call duties required of desired employment position not disability under ADA).

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED SEPTEMBER 3, 1998

KELVIN WASHINGTON,

Plaintiff-Appellee

v.

HCA HEALTH SERVICES OF TEXAS, INC., doing business as HCA Spring Branch Medical Center,

Defendant-Appellant

No. 97-20310
United States Court of Appeals,
Fifth Circuit
September 3, 1998

* * *

Before POLITZ, Chief Judge, GARWOOD and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

In this interlocutory appeal, we are asked to decide whether a court should consider the plaintiff's *medicated* or *unmedicated* condition to determine whether the plaintiff has a "disability" under the Americans with Disabilities Act (ADA).

Appendix A

Facts and Proceedings Below

Plaintiff-appellee Kelvin Washington (Washington) brought a claim under the ADA against his former employer, defendant-appellant HCA Health Services of Texas, Inc. (the Hospital), alleging that he was discriminated against in violation of the ADA due to the fact that he suffers from Adult Stills Disease.

Washington began working for HCA Health Services of Texas, Inc. d/b/a the Spring Branch Medical Center, on September 26, 1991, as a senior accountant. Prior to this he was employed at another HCA facility from July 3, 1989, until September 1991. In July 1989, Washington was diagnosed with Adult Stills Disease, a degenerative rheumatoid condition affecting his bones and joints; as a result of this disease, he also suffers from Membranous Glomerulonephritis, a related kidney disease.

Washington is able to control the effects of this disease through medication. He regularly takes four prescription medications that control the pain and other symptoms associated with the disease. Thanks to this medication, he is able to lead a relatively normal life; without such treatment, Washington would be bedridden and unable to work.

In 1993 the demands of Washington's job increased and he often worked sixty to eighty hour weeks. In May 1993 Washington collapsed at work and his doctor recommended that he limit his work to ten hours per day and fifty hours per week. The doctor believed that this work restriction was necessary because Washington's disease activity had increased as a result of the twelve to sixteen hour days that he had been working.

Appendix A

Washington informed his supervisor about his doctor's advice and through a lawyer he requested that, as a person with a disability under the ADA, he be accommodated. Washington asserts that the requested accommodation was refused, but he nevertheless limited his work hours to fifty hours per week, in accordance with his doctor's advice. Shortly thereafter, the Hospital eliminated one of the two senior accountant positions during a work force reduction, and Washington was terminated. He filed this suit alleging that he was terminated in violation of the ADA.

The suit was initially filed on April 13, 1994, in Texas state court, but the Hospital filed a Notice of Removal and the case was subsequently removed to the United States District Court for the Southern District of Texas, Houston Division.

On March 17, 1995, the Hospital filed a motion for summary judgment claiming that it had a nondiscriminatory reason for terminating Washington's employment. The court granted the motion on May 18, 1995. In response, Washington filed a motion for new trial; the motion was denied, and Washington appealed. This Court reversed the summary judgment, finding a triable issue of fact regarding the Hospital's motive for laying off Washington, and remanded the case back to the district court. *See Washington v. HCA*, No. 95-20628, 95 F.3d 45 (5th Cir. 1996) (unpublished).

On remand, the Hospital filed another motion for summary judgment, arguing that Washington was not "disabled" under the ADA since this disease was effectively controlled by medication. The court denied the motion, ruling that Washington's condition should be considered in its unmedicated state and as such constituted a disability under the ADA. The

court, however, recognized that the question whether an individual must be assessed in his medicated or unmedicated state is a novel question in this Circuit and certified it for appeal to this Court pursuant to 28 U.S.C. § 1292(b).[1] Thus, the sole question before us is whether a court must assess an individual's condition with or without regard to mitigating measures, when determining whether that individual is "disabled" under the ADA.

Discussion

I. The ADA

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Thus, to establish a claim under the ADA, a plaintiff must demonstrate that:

(1) he is *disabled* within the meaning of the ADA;

(2) he is *qualified*; and

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1. We agree with the district court that this is a novel question that has not been explicitly resolved by this Court or the Supreme Court. In a recent ADA case the Supreme Court noted the dispute over whether mitigating measures should be considered, but did not further explore the issue. *See Bragdon v. Abbott*, __ U.S. __, ___, 118 S.Ct. 2196, 2206, 141 L. Ed. 2d. 540 (1998).

(3) the employer *discriminated* against him based on his alleged disability.

See Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758, 762 (5th Cir. 1996); *Daugherty v. City of El Paso*, 56 F.3d 695, 696 (5th Cir. 1995). This appeal is concerned only with the first prong.

To satisfy the first prong of an ADA cause of action, a plaintiff must demonstrate that he is disabled by satisfying one of the prongs of the ADA's definition of disability. Under the ADA, a disability is defined as:

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C).

The only question before us is whether Washington satisfies subparagraph (A). Under subparagraph (A), a plaintiff must demonstrate that: (1) he has an *impairment, and* (2) that impairment *substantially limits* a major life activity.[2] The ADA does not specify whether the existence of an impairment or the determination of whether an impairment substantially limits a major life activity should be made with regard to medication or other mitigating measures. Because the text of the ADA is not unambiguously clear on this matter, we turn to other sources

2. The terms "impairment" and "substantially limits" are not further defined by the ADA.

for guidance. The two main sources that guide our decision are the EEOC's Interpretive Guidelines and the legislative history of the ADA.[3]

II. The Legislative History

The EEOC's interpretation is consistent with much of the legislative history of the ADA. The House Education and Labor Committee Report discusses the three-pronged definition of disability. With regard to the first prong ("a physical or mental impairment that substantially limits one or more of the major life activities of such individual," 42 U.S.C. § 12102(2)(A)) the Committee Report explains that:

> "Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication." H.R. REP. No. 101-485(II) at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

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3. *Cf. Guilzon v. Commissioner,* 985 F.2d 819, 823-24 n.11 (5th Cir. 1993) (stating that, "Fifth Circuit law is crystal clear that when . . . the language of a statute is unambiguous, this Court has no need to and will not defer to extrinsic aids or legislative history.").

Appendix A

The House Judiciary Committee Report uses similar language to describe the breadth and meaning of the first prong of the definition of disability:

> "The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation. For example, a person with epilepsy, an impairment which substantially limits a major life activity, is covered under this test, even if the effects of the impairment which substantially limits a major life activity, is also covered, even if the hearing loss is corrected by the use of a hearing aid." H.R. REP. No. 101-485(III) at 28, *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

The Senate Labor and Human Resources Committee Report, however, is somewhat inconsistent with these two House Reports. Like the House Reports, the Senate Report states that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. REP. No. 101-116, at 23 (1989). But, the Senate Report then goes on to describe the purpose of the third prong ("being regarded as having such an impairment" 42 U.S.C. § 12102(2)(C)):

> "Another important goal of the third prong of the definition is to ensure that persons with *medical conditions that are under control*, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. [Examples include:] individuals with

> *controlled diabetes or epilepsy* ... [or individuals who] wear *hearing aids* . . ." S. REP. No. 101-116, at 24 (1989) (emphasis added).

The Senate Report is thus to some extent inconsistent with the House Reports in its treatment of individuals with controlled disabilities. While the House Reports indicate that individuals with epilepsy, diabetes, or hearing impairment should be assessed without regard to mitigating measures and therefore considered to be "disabled" under the first prong, the Senate Report suggests that these individuals ought to be assessed in their medicated state and thus are not disabled because they are not substantially limited in a major life activity; the Senate Report does, however, then go on to state that these individuals may be compensated under the ADA if they are discriminated against because they are "regarded as" being disabled.

Because of this partial inconsistency, we must choose whether to give more significance to the Senate Report or to the House Reports. For several reasons, we will give more weight to the House Reports. First, the House Reports are express and directly on point. The House Reports explicitly state in their discussions of the first prong that under the first prong a disability must be considered without regard to mitigating measures; the Senate Report, on the other hand, does not address the "mitigating measures" issue under the first prong, and instead discusses this aspect of the first prong in its discussion of the third prong.

A second reason why we follow the House Reports is that they came after the Senate Report. Given that much of the structure and language of the House Reports was borrowed from the Senate Report, it seems that the House Committees were

aware of how the Senate Report dealt with the mitigating measures issue and consciously changed the language of the Reports.

Finally, the Senate Bill that was ultimately passed was amended to contain much of the text of the House Bill, indicating that the House's understanding of the ADA controlled the bill that was passed.

The EEOC also seems to have given greater weight to the House Reports and followed their explicit language rather than the language of the Senate Report.

III. The EEOC Interpretive Guidelines

The EEOC has determined that under the ADA a plaintiff should be assessed in his *unmedicated* condition in order to determine whether he is disabled. In its *Interpretive Guidance On Title I of [the ADA],* the EEOC has stated that the "existence of an impairment" must be determined *"without regard to mitigating measures* such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. § 1630.2(h) (emphasis added). Likewise, the "determination of whether an individual is substantially limited in a major life activity" must also be made *"without regard to mitigating measures* such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. § 1630.2(j) (emphasis added).

In some cases, courts have refused to follow the EEOC and held that a person should be assessed in his medicated state. In a case concerning pilots who must wear eyeglasses in order to see clearly, the Tenth Circuit declined to follow the EEOC Guidelines and dismissed the pilots' ADA claim. The court

held that the EEOC Guidelines are contrary to the plain language of the ADA, and that mitigating measures, such as eyeglasses, must be taken into account when determining whether an individual is disabled. *See Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 902 (10th Cir. 1997) ("We hold that [section 1630.2(j)] of the EEOC's Interpretive Guidance is in direct conflict with the plain language of the ADA. The determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual.").[4] The Sixth Circuit has also expressed an inclination to disregard the EEOC. *See Gilday v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir. 1997) (Kennedy, J., concurring in part and dissenting in part) and (Guy, J., concurring in part and dissenting in part). In *Gilday*, the court was faced with the issue of whether a non-insulin dependant diabetic who took oral medication was disabled. Although the court never reached a clear resolution of the matter, it suggested that mitigating measures ought to be considered.

We are not unsympathetic to this reasoning. In fact, we think that these cases, which have held that mitigating measures must be taken into account, offer the most *reasonable* reading of the ADA.[5] However, we also recognize that we cannot simply

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4. Several district courts have also held that mitigating measures should be considered. *See, e.g. Cline v. Fort Howard Corp.*, 963 F.Supp. 1075, 1081 n. 6 (E.D. Okla. 1997); *Gaddy v. Four B Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997); *Moore v. City of Overland Park*, 950 F.Supp. 1081, 1088 (D. Kan. 1996); *Murphy v. United Parcel Serv., Inc.*, 946 F.Supp. 873, 881 (D.Kan. 1996); *Schluter v. Industrial Coils, Inc.*, 928 F.Supp. 1437, 1445 (W.D. Wis. 1996); *Coghlan v. H.J. Heinz Co.*, 851 F.Supp. 808, 813 (N.D. Tex. 1994).

5. We have on at least one occasion expressed skepticism over (Cont'd)

ignore the legislative history and EEOC Guidelines that dictate the opposite result. Only if we determine that the statute was unambiguous on its face and the agency interpretation was contrary to the plain meaning of the statute, can we ignore the EEOC's interpretation. *See Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 109 S.Ct. 2854, 2863, 106 L. Ed. 2d 134 (1989) ("[N]o deference is due to agency interpretations a odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."). Contrary to the Tenth Circuit's conclusion that the ADA is susceptible to a plain reading, *Sutton*, 130 F.3d at 902, we find the statute to be ambiguous, and thus we cannot ignore the EEOC's interpretation.

Because the EEOC's Interpretive Guidelines are not only not promulgated pursuant to any delegated authority to define statutory terms or the like but are also not subject to the notice and comment procedure like regulations are, they are not entitled to the high degree of deference that is accorded to regulations under the *Chevron* doctrine,[6] but the interpretations

(Cont'd)
whether Congress really intended that we consider an individual without regard to mitigating measures. *See Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191-92 n.3 (5th Cir. 1996) (stating in *dicta* that "had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the *potential* to substantially limit a major life activity."). While we share the skepticism expressed in *Ellison*, we recognize that the issue was not before the *Ellison* court and hence it was not fully explored or resolved; the court's statements are mere *dicta* and are not binding in this case.

6. The *Chevron* doctrine dictates that a court must defer to an
(Cont'd)

are given *some* deference. *See Batterton v. Francis,* 432 U.S. 416, 97 S.Ct. 2399, 2405 n.9, 53 L. Ed. 2d. 448 (1977) ("[A] court is not required to give effect to an interpretive regulation. Varying degrees of deference are accorded to administrative interpretations. . . ."); *see also Shalala v. Guernsey Memorial Hospital,* 514 U.S. 87, 115 S.Ct. 1232, 1239, 131 L. Ed. 2d. 166 (1995) (holding that interpretive rules, which are not subject to the notice and comment procedure, are not accorded the weight that regulations are given). In *Skidmore v. Swift & Co.,* 323 U.S. 134, 65 S.Ct. 161, 164, 89 L. Ed. 124 (1944), the Court recognized that agency interpretations are not controlling, but they do "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[7]

The amount of deference that a court must give to agency interpretations depends on several factors. The factors include: "the circumstances of their promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into its formulation, and the nature of the agency's expertise." *Rowinsky v. Bryan Independent School District,* 80 F.3d 1006, 1014 n.20 (5th Cir. 1996); *see also Batterton,* 97 S.Ct. at 2405 n.9 (1977).

(Cont'd)
agency regulation if the agency's interpretation of an ambiguous statute flows naturally from a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L. Ed. 2d 694 (1984).

7. *See also Bragdon v. Abbott,* __U.S. __, __, 118 S.Ct. 2196, 2207, 141 L. Ed. 2d 540 (1998) (citing this passage of *Skidmore*).

Applying these factors to the current dispute, we find that: (1) the EEOC's Interpretive Guideline has been a part of its regulations since the regulations were promulgated,[8] (2) they have consistently interpreted "disability" to mean "without regard to mitigating measures"; (3) the legislative history supports the agency's interpretation; and, finally, (4) the EEOC has significant expertise and authority to interpret and promulgate regulations under the ADA. In light of this, we find that we must give more than minimal deference to the EEOC's Interpretive Guidelines.

IV. Analysis

Although we think it is more reasonable to say that mitigating measures must be taken into account,[9] we recognize

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8. Both the 1992 and the current version of the EEOC Interpretive Guidelines state that the "existence of an impairment" and the "determination of whether an individual is substantially limited in a major life activity" must be determined "without regard to mitigating measures such as medicines, or assistive or prosthetic devices." *Compare* 29 C.F.R. Pt. 1630 App. § 1630.2(h)&(j) (1992) *with* 29 C.F.R. Pt. 1630 App. § 1630.2(h)&(j) (1996).

9. In a case decided under the Rehabilitation Act, 29 U.S.C. §§ 701-796, a closely related statute and precursor to the ADA, we suggested that an individual must be assessed in his mitigated stare and held that an insulin-dependent diabetic and a person with impaired vision were not "handicapped" under the Rehabilitation Act. *See Chandler v. City of Dallas*, 2 F.3d 1385, 1390-91 (5th Cir. 1993). Although the ADA's definition of "disability" is borrowed from the Rehabilitation Act's definition of "handicapped," *Chandler* does not control this case. A case decided under the Rehabilitation Act is not controlling over the legislative history and administrative guidelines of the ADA, which indicate that mitigating measures should not be taken into consideration.

that our position is not so much more reasonable to warrant overruling the EEOC. Thus, we will follow the EEOC Guidelines and the legislative history, but we read them narrowly. There is nothing in the Interpretive Guidelines or the legislative history that suggests that *all* impairments must be considered in their unmitigated states and *no* mitigating measures may ever be taken into account.

We hold that only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history — diabetes, epilepsy, and hearing impairments — will be considered in their unmitigated state. The impairments must be serious in common parlance, and they must require that the individual use mitigating measures on a frequent basis, that is, he must put on his prosthesis every morning or take his medication with some continuing regularity. In order for us to ignore the mitigating measures, they must be continuous and recurring; if the mitigating measures amount to permanent corrections or ameliorations, then they may be taken into consideration.

If an individual has a permanent correction or amelioration, such as an artificial joint or a pin or a transplanted organ, that individual must be evaluated in his mitigated state and cannot claim that he is disabled because he would be "substantially limited in a major life activity" if he had *not* had his hip joint replaced. *Cf. Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996) (evaluating a plaintiff with hip and shoulder replacements in his mitigated state).

Whether an individual must be evaluated without regard to mitigating measures depends on both the nature of the impairment and the mitigating measures employed by the

individual. Thus, these issues must be considered on a case by case basis to determine whether the individual disease and the accompanying mitigation fall within the scope of the EEOC Guidelines and the legislative history. Some conditions, such as diabetes, will clearly have to be considered *without* regard to mitigating measures; others, such as hip replacements, will not have to be evaluated *with* regard to mitigating measures. But most cases will not be as clear and we leave these for another day. For example, a correctable vision impairment, may or may not be sufficiently similar to the ailments enumerated in the EEOC Guidelines and legislative history, and as such we cannot say whether mitigating measures such as eyeglasses or laser surgery should be considered in assessing whether an individual is disabled.

Based on the summary judgment evidence, we hold that Washington's Adult Stills Disease is sufficiently analogous to the ailments contemplated in the legislative history and the EEOC Interpretive Guidelines; his disease, like diabetes or epilepsy, is serious and requires that he take medication every day. Because Adult Stills Disease falls within the EEOC Interpretive Guidelines and the legislative history, mitigating measures should not be taken into account when assessing whether Washington is "disabled" under the ADA.

To a limited extent, we are joining the other circuits that have followed the EEOC Guidelines and held that a disability must be assessed without regard to mitigating measures. *See Arnold v. United Parcel Svc.*, 136 F.3d 854 (1st Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997); *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *Holihan v. Lucky Stores, Inc.*, 87

F.3d 362, 366 (9th Cir. 1996); *Roth v. Lutheran General Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995).[10] But unlike these cases, we are not making a broad pronouncement that all impairments must be considered in their unmitigated state. Our holding is more limited; whether mitigating measures should be taken into account must be determined on a case by case basis under the general approach outlined above.[11]

Conclusion

For the foregoing reasons, we affirm the district court's resolution of this matter. Washington should be evaluated in his unmedicated state.

AFFIRMED

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10. Several district courts have also held that mitigating measures should not be considered. *See, e.g., Fallacaro v. Richardson*, 965 F.Supp. 87, 93 (D.D.C. 1997); *Wilson v. Pennsylvania State Police Dep't.*, 964 F.Supp. 898, 902-907 (E.D. Pa. 1997); *Sarsycki v. United Parcel Service*, 862 F.Supp. 336, 340 (W.D. Okla. 1994).

11. Judge Guy seems to have taken a somewhat similar approach in *Gilday*, 124 F.3d at 768.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED FEBRUARY 7, 1997

Kelvin Washington,

Plaintiff

v.

HCA Health Services of Texas, Inc. d/b/a HCA Spring Branch Medical Center,

Defendant.

Civ. A. No. H-94-1831
United States District Court,
Southern District of Texas
February 7, 1997

* * *

MEMORANDUM OPINION AND ORDER

ROSENTHAL, DISTRICT JUDGE

Pending before this court is a second motion for summary judgment filed by defendant, HCA Health Services of Texas, Inc. d/b/a HCA Spring Branch Medical Center ("HCA") (Docket Entry No. 36). The motion is based on HCA's contention that plaintiff Kelvin Washington ("Washington") does not qualify as an individual with a disability under the Americans with Disabilities Act of 1990 ("ADA").

Appendix B

Washington suffers from Adult Stills Disease. With medication, he is able to work in his profession as an accountant as long as he is not required to spend more than ten hours per day, five days per week, at his job. (Docket Entry No. 39, Exh. B, pp. 104-05). Without his medication, he would be bedridden and unable to work at all. (Docket Entry No. 39, Exh. A, p. 1). HCA asserts that whether Washington is disabled under the ADA should be determined based on his medicated condition. Washington asserts that under the ADA, whether an individual is disabled must be determined without reference to the effects of medications or other mitigating treatment.

The courts have recently divided over this discrete issue. In a footnote in a recent opinion, the Fifth Circuit suggested that to adopt the position Washington asserts would be "arguably" inconsistent with the ADA, and several recent district court decisions have explicitly rejected the position Washington advocates. On the other hand, the Eleventh Circuit and some district courts have held that a court should disregard the ameliorative effects of medication in determining whether there is a fact issue as to a plaintiff's disability under the ADA.

This court has carefully reviewed the present record, as well as the conflicting cases. Based on the motion, the parties' submissions, and the applicable law, this court DENIES the motion for summary judgment. This court finds that based on Washington's unmedicated condition, there is at a minimum a genuine issue of fact as to whether he is "disabled" under 29 U.S.C. § 12102(2)(A). This court recognizes that this result is based on a controlling question of law as to which there is substantial ground for difference of opinion and that the resolution of this issue will materially advance the termination of this litigation. This court therefore certifies the issue of

whether "disability" under 42 U.S.C. § 12102(2)(A) is to be determined without reference to medications or other mitigating measures for interlocutory appeal under 28 U.S.C. § 1292(b).

I. Factual Background

The relevant facts as to plaintiff Kelvin Washington's medical condition and its impact on his major life activity of work are undisputed. Washington began working for the Spring Branch Medical Center on September 26, 1991, as a Senior Accountant. From July 3, 1989 until September 1991, Washington had worked at another HCA facility.

In July 1989, Washington was diagnosed with Adult Stills Disease, a degenerative rheumatoid disease affecting bones and joints. Washington also suffers from a kidney disorder, Membranous Glomerulonephritis, as a result of his Adult Stills Disease. From 1989 to 1994, Washington visited a doctor approximately twelve times each year in connection with his disease. He was able to control the effects of the disease through "substantial medication."[1] Without the medications, unless he was in remission, Washington would be confined to bed rest and would be unable to work at all. With the medication, he is able to work and his pain is "largely controlled." At the end of 1992, Washington had surgery related to his disease. Before the surgery, HCA was not even aware of Washington's condition.

From January through May 1993, the demands of Washington's job increased. He was required to, and did, work

1. Washington takes iodine, prednisone, maxide, and methrotrexate for his Adult Stills condition. (Washington affidavit, Docket Entry No. 39, Exhibit A, p. 1).

sixty to eighty hours each week. In late May 1993, Washington collapsed at work and required emergency treatment. In June 1993, Washington's doctor recommended that Washington limit his work to ten hours per day and fifty hours per week because his disease activity had increased as a result of work hours "which exceeded 12 to 16 hours per day." (Docket Entry No. 39, Exhibit B). Washington provided this information to his supervisor. On June 7, 1993, Washington's lawyer provided HCA's Director of Human Resources with a letter asserting that Washington qualified as a person with a disability under the ADA and requesting accommodation in the form of job restructuring, a modified work schedule, or a transfer to a vacant position in another department, so as to limit his work schedule to no more than ten hours per work for five consecutive days.

In this lawsuit, Washington asserts that after this letter was sent, HCA refused to accommodate his disability and his supervisor told him that her only concern was work deadlines, not Washington's health. In late July or early August 1993, Washington limited his hours to fifty hours per week. On August 10, 1993, Washington was terminated. His termination occurred at the time of a reduction in force that included the accounting department. Washington's position, one of the two senior accountant positions, was eliminated and his employment terminated. Washington filed this suit.

II. Procedural History

Washington filed his original petition in state court on April 13, 1994. On May 27, 1994, HCA removed the case to this court. On March 17, 1995, HCA moved for summary judgment, claiming that Washington was not disabled under the ADA and that even if he was, his alleged disability played no role in his

termination. On May 18, 1995, this court granted HCA's summary judgment. This court found that Washington was disabled under the ADA, but that HCA had a legitimate nondiscriminatory reason for terminating Washington. On June 26, 1996, the Fifth Circuit Court of Appeals reversed the grant of summary judgment on the basis that a fact issue existed regarding HCA's motivation for selecting Washington's job category for layoff. The Fifth Circuit remanded this case for further proceedings. On appeal, the parties did not raise, and the Fifth Circuit did not address, the threshold issue of whether Washington was disabled under the statute.

HCA filed this second motion for summary judgment on November 7, 1996. In this motion, HCA asks this court to reexamine Washington's ability to qualify as a disabled individual under the ADA, on the basis that recently decided cases have clarified the applicable law. HCA asserts that Washington's Adult Stills Disease does not substantially limit any of his major life activities because with the medication he takes, his only restriction is that he can work no more than fifty hours per week. In his response, Washington asserts that whether he is disabled under the ADA must be determined based on his unmedicated condition.[2]

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2. Washington asserts that this court is foreclosed from reexamining whether he is disabled under the ADA by this court's prior ruling, on the ground that it is the "law of the case." (Docket Entry No. 39, p. 4). The law of the case doctrine provides that once a court of competent jurisdiction decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case. *Copeland v. Merrill Lynch & Co., Inc.*, 47 F.3d 1415, 1423 (5th Cir. 1995). However, "the law of the case doctrine is a discretionary rule of practice which does not limit the *power* of the court to revisit a legal issue." *Id.*

(Cont'd)

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III. Impaired, Substantially Limited . . . and Disabled

In 1990, Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (West 1995). The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, . . . and other terms, conditions, and privileges of employment." *Id.*, § 12112(a). The statute creates an affirmative duty reasonably to accommodate otherwise qualified individuals with disabilities, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business. *Id.*, § 12112(b)(5)(A).

To establish a *prima facie* case of disability discrimination under the ADA, Washington must show that (1) he was "disabled" as defined by the ADA; (2) he was qualified to

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(Cont'd)

at 1424. Courts specifically recognize that the law of the case doctrine permits a change of position when it appears that the original ruling in the case was wrong; the controlling authority has since made a contrary decision of law applicable to such issues; or the decision was clearly erroneous and would work a manifest injustice. *Id.* at 1424; *see also, DFW Metro Line Services v. Southwestern Bell Telephone*, 988 F.2d 601,604 (5th Cir.), *cert. denied*, 114 S.Ct. 183 (1993) (citations omitted). As courts have noted, the "law of the case doctrine is a prudential rule of policy and practice, rather than 'an absolute bar to reconsideration [] or a limitation on a federal court's power.'" *United States v. Rivera-Martinez*, 931 F.2d 148, 150-51 (1st Cir.), *cert. denied*, 112 S. Ct. 184 (1991); *Arizona v. California*, 103 S. Ct. 1382, 1391 n.8 (1983). The law of the case doctrine does not bar reconsideration here.

perform the essential functions of his job, with or without reasonable accommodation; and (3) he was discriminated against because of his disability. *Daigle v. Liberty Life Ins.*, 70 F.3d 394, 396 (5th Cir. 1995); *Aikens v. Banana Republic, Inc.*, 877 F.Supp. 1031, 1036 (S.D. Tex. 1995).

The ADA defines "disability," as follows:

> (A) A mental or physical impairment that substantially limits one or more major life activities in such individual;
>
> (B) A record of such impairment; or
>
> (C) Being regarded as having such impairment.

42 U.S.C. § 12102(2)(A), (B), and (C). Washington contends that he is disabled under the first definition, which requires him to raise a genuine issue of material fact as to whether his Adult Stills Disease is an impairment that substantially limits one or more of his major life activities.[3]

The EEOC regulations define "physical or mental impairment" to include any "physiological disorder . . . affecting one or more of the following bodily systems: neurological, musculoskeletal, . . ." 29 C.F.R. §§ 1630.2(h)(1). It is undisputed that Washington's Adult Stills Disease is an "impairment." The issue is whether a material fact question exists as to whether this impairment substantially limits one or more of Washington's major life activities.

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3. Washington does not contend that he is disabled because he had a record of an impairment or was regarded as having an impairment under 42 U.S.C. § 12102(2)(B) and (C) and 29 C.F.R. § 1630.2(g).

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Noting that the ADA defines neither "substantially limits" nor "major life activities," the Fifth Circuit has relied on the "regulations promulgated by the EEOC under the ADA [to] provide significant guidance." *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995). The EEOC regulations define "major life activities" to include functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(I). "Substantially limits" is defined in the EEOC regulations as follows:

> (1) Unable to perform a major life activity that the average person of the general population can perform, or
>
> (2) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. §§ 1630.2(j). Whether an impairment "substantially limits" a major life activity is determined in light of:

> (1) the nature and severity of the impairment;
>
> (2) the duration or expected duration of the impairment; and
>
> (3) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. §§ 1630.2(j)(ii)(2).

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Washington alleges that without his medication, he is unable to perform many major life activities, including, but not limited, to his work. HCA asserts that with his medication, Washington can perform all major life activities, including work, without substantial limitation. *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155, 164 (5th Cir.), *cert. denied*, 117 S. Ct. 583 (1996).

Under the ADA and the EEOC regulations and interpretive guidance to the statute, "[I]f an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered. If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working." 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630, App., § 1630.2(j). The effects of Washington's impairment, considered without regard to his medicated condition, are not confined to the life activity of working. With the controlling effects of the medication taken into account, Washington's disease has only one limitation: he cannot work more than fifty hours per week. The case law and the EEOC interpretive guidance make it clear that such a narrow limit would not be a "substantial limitation on the life activity of working" under the ADA. With regard to the activity of working:

> [S]ubstantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29. C.F.R. § 1630(j)(3)(I). The courts have made it clear that the inability to perform one aspect of a job, while retaining the ability to perform the work in general, does not amount to a substantial limitation of the activity of working. *See, e.g., Ray v. Glidden Co.*, 85 F.3d 227, 229 (5th Cir. 1996); *Dutcher*, 53 F.3d at 727.

Washington therefore does not assert that his medicated condition renders him substantially limited in any major life activity. Instead, Washington asserts that, under the EEOC interpretive guidance to the ADA, whether his impairment substantially limits one or more of his major life activities must be determined without regard to the medication he takes.

Washington relies on the EEOC's interpretive guidance found at 29 C.F.R. Pt. 1630 App. §§ 1630.2(h) and (j). The first guideline states, in relevant part, that:

> The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

29 C.F.R. Pt. 1630 App. § 1630(h). The second interpretive guideline states:

> The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

29 C.F.R. Pt. 1630, App. § 1630.2(j).

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The EEOC interpretive guidance includes examples making the applicable standard clear:

> For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.
>
> * * * * *
>
> An individual who uses artificial legs would likewise be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

29 C.F.R. Pt. 1630 App. § § 1630.2(h).

The issue is whether the impact of Washington's disease on his major life activities is to be considered with, or without, regard to the controlling effect of the medication he takes. With the medication, Washington can perform all major life activities. Without the medication, Washington is bedridden. The impact of this discrete question could not be more starkly presented.

IV. The Case Law on Disability under the ADA: Treated or Untreated Conditions

HCA asserts that under recent case law, whether an impairment substantially limits a major life activity is to be based on the individual's medicated condition. In *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 n.3 (5th Cir. 1996), the plaintiff was diagnosed with breast cancer in August 1993. From September 1993 through October 1993, she was treated with surgery and radiation therapy. During the six weeks of her treatment, her employer allowed her to work a modified schedule. By February 1994, plaintiff felt "back to normal." *Id.* at 188. In early 1994, plaintiff received a lower evaluation and a lower raise than other employees. Her position was subsequently eliminated in a reduction in force, but she was offered another position that became vacant. She subsequently filed suit, asserting a violation of the ADA. The district court held that her breast cancer was not a "disability." On appeal, the Fifth Circuit noted that plaintiff had not contended before the district court that her cancer treatment substantially limited any major life activity other than working. The court therefore assessed only whether the cancer and treatment "substantially limited" the major life activity of working. *Id.* at 187. In analyzing whether the impairment of the disease substantially limited the plaintiff's ability to work, the Fifth Circuit looked to the plaintiff's post-surgery and post-radiation treated condition. 85 F.3d at 190-91. The court found that, although the radiation treatment caused the plaintiff to feel pain, nausea, and fatigue, the treatment did not affect her ability to do the essential responsibilities of her job. *Id.*

In *Ellison,* the plaintiff argued that it was irrelevant that her cancer had been treated successfully. The plaintiff asserted

that the court should determined "the existence of one's disability . . . without regard to the effects of mitigating measures such as drugs or prosthesis." *Id.* The Fifth Circuit refused to consider this argument, because it was not presented to the district court. In a footnote, the court commented on the EEOC's Interpretive Guidance, as follows:

> . . . the appendix is not part of the regulations, but is, instead, the EEOC's interpretation of those regulations. See 29 C.F.R. Pt. 1630, App., Introduction. Furthermore, the part [plaintiff] relies on addresses impairment, not disability, stating that "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices". . . . For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid. 29 C.F.R. Pt. 1630, App. § 1630.2(h) (emphasis added). Again, it is undisputed that [plaintiff's] cancer was an impairment; but, "[a] physical impairment, standing alone, is not necessarily a disability as contemplated by the ADA [because t]he statute requires an impairment that substantially limits one or more of the major life activities". *Dutcher,* 53 F.3d at 726. We recognize, consistent with [plaintiff's] contention, that App. § 1630.2(h) does provide that "[t]he determination of whether an individual is substantially limited in a major life

> activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices". 29 C.F.R. Pt. 1630, App. § 1630.2(h). *Arguably, on the other hand, had Congress intended that substantial limitation be determined without regard to mitigating measures, it would have provided for coverage under § 12102(2)(A) for impairments that have the potential to substantially limit a major life activity.*

Id. at 190, n.3 (emphasis added).

Washington argues that this footnote does not establish that this circuit has abandoned the standard set out in the EEOC regulation. (Docket Entry No. 39, p.8). In *Ellison,* the court did not rule on the claim that the existence of a disability must be determined based on the plaintiff's nonmedicated condition, but "simply noted that an argument could be made to the contrary." *Id.*

In *Chandler v. City of Dallas,* 2 F.3d 1385 (5th Cir. 1993), *cert. denied,* 114 S.Ct. 1386 (1994), decided under the Rehabilitation Act, the Fifth Circuit found that under the Rehabilitation Act, the plaintiff, an individual with insulin-dependent diabetes was not "handicapped." The court rejected plaintiff's contention that his condition was a "handicap *per se.*" 2 F.3d at 1390. In so doing, the Fifth Circuit noted that the EEOC's interpretive guidance for the ADA defined "disability" under the ADA as substantially equivalent to the term "handicap" in the Rehabilitation Act. The Fifth Circuit acknowledged that under the EEOC's approach in section 1630.2(j), an individual with insulin dependant diabetes would

be disabled *per se*. The Fifth Circuit did not resolve the conflict, finding that the plaintiff had failed to establish that he was otherwise qualified for the job at issue. However, the Fifth Circuit noted its previous holding that a person is not "handicapped" if his vision could be corrected to 20/200. 2 F. 3d at 1390.

In *Harris v. H. & W. Contracting Company*, 102 F. 3d 516, 519 (11th Cir. 1996), the Eleventh Circuit directly addressed the issue before this court. In that case, the plaintiff claimed that she was disabled because she had active Graves disease. The defendant employer argued that the plaintiff was not disabled because her condition, when treated, did not substantially limit a major life activity. *Id* at 521. The Eleventh Circuit rejected that argument, stating that the court could not "disregard the interpretive guidance contained in the appendix prepared by the federal agency charged with enforcing the ADA, when that guidance is based on a permissible construction of the statute and is supported by the statute's legislative history." *Id*. In determining that the regulation was based on a "permissible construction of the statute," the court stated that "there is no direct conflict between the interpretation contained in the appendix to the regulations and the language of the statute itself [and there] is nothing inherently illogical about determining the existence of a substantial limitation without regard to mitigating measures such as medicines or assistive or prosthetic devices." *Id*.

The Seventh Circuit has apparently accepted the EEOC interpretive guidance as the applicable standard, stating that the "determination of . . . the extent to which an impairment limits the individual's major life activities must be made without regard to the availability of mitigating measures." *Roth v.*

Lutheran General Hosp. 57 F. 3d 1446, 1454 (7th Cir. 1995). However, the Seventh Circuit did not directly analyze the challenge now presented, and in *Roth*, the outcome did not depend on the difference between the condition as treated and without treatment.

Washington asserts that the Sixth Circuit has also adopted the EEOC interpretive guidance as the standard, citing *Rousch v. Weastec, Inc.*, 96 F. 3d 840 (6th Cir. 1996). In *Rousch*, the plaintiff claimed to be disabled due to a kidney and bladder condition. The defendant agreed that both the kidney and bladder conditions constituted impairments, but contended that those impairments were not substantially limiting. With regard to the plaintiff's bladder condition, the Sixth Circuit stated:

> During her deposition, plaintiff testified that this condition causes her substantial pain such that she cannot engage in a major life activity, work, without medication. Even with medication, plaintiff claims she suffers pain. Further, plaintiff's doctor testified that she visits his office monthly or semi-monthly for the treatment of infections and pain caused by the condition. We conclude, therefore, that plaintiff has created an issue of material fact as to whether her bladder condition substantially limits her working.

96 F. 3d at 844. The Sixth Circuit looked both at the medicated and unmedicated conditions to determine whether the plaintiff's impairment substantially limited her ability to work.

Several district courts have expressly rejected the EEOC interpretive guidance as inconsistent with the statutory

definition of disability. In *Coghlan v. HJ Hines Co.*, 851 F. Supp. 808 (N.D. Tex. 1994), the court held that the EEOC's interpretation that the plaintiff's limitation should be considered without regard to his use of insulin was "at odds" with the clear statutory language of the ADA, which requires that a disability cause a substantial limitation. The court stated:

> [I]n order to have a disability under the ADA, one must have a physical or mental impairment that substantially limits one or more life activity. Yet the EEOC's interpretive guidance states that a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication. This gloss reads "limits" right out of the statute because an insulin-dependant diabetic who takes insulin could perform major life activities and would therefore not be limited. Because the EEOC gloss requires determination of "disability' regardless of an insulin-dependant diabetic's limitation, it is at odds with the statute. In other words, the EEOC interpretation requires that one not having a limitation be considered as having a disability even though the statutory language clearly requires substantial limitation. As Defendant argues, to allow such an interpretation would be to allow one having no limitation to satisfy a condition that clearly requires limitation. Thus cast, the EEOC's interpretive guidance quoted above is directly at odds with clear statutory language. Although "limitation" may carry different shades of meaning, it cannot be meaningless, which is what acceptance

> of the EEOC's interpretation would render it. The Court therefore concludes that the EEOC's gloss should be rejected as contrary to [the ADA].

851 F. Supp. at 812-13.

This same analysis was used by the United States District Court for the District of Kansas in *Murphy v. United Parcel Service, Inc.*, 1996 WL 699380 (D. Kan. October 22, 1996). In *Murphy*, the plaintiff was a UPS mechanic who suffered from hypertension. The court rejected his argument that whether his hypertension constituted a disability under the statute should be determined without regard to the medication he took. 1996 WL 699380 at 10. The court explained that "[a]though agency interpretations are to be given deference, in this instance the EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment 'substantially limits' their lives." *Id.* at 10. The court concluded that:

> [i]f an insulin-dependant diabetic can control her condition with the use of insulin or a near-sighted person can correct her vision with eye glasses or contact lenses, she cannot argue that her life is substantially limited by her condition. To say that a person who needs insulin or eye glasses is disabled in fact is to read out of that Act's first definition of disability the requirement that it applies only to those persons who are "substantially limited" in major life activities.

Id.

In *Schluter v. Industrial Coils, Inc.*, the district court for Wisconsin refused to consider how diabetes would

hypothetically affect the plaintiff if she was unable to obtain insulin. 928 F Supp. 1437, 1445 (W.D. Wis 1996) The court explained:

> Although agency interpretations are to be given deference, . . . in this instance the EEOC's interpretation is in direct conflict with the language of the statute that requires plaintiffs in ADA cases to show that an impairment "substantially limits" their lives. 42 U.S.C. § 12102(2)(A). *See Public Employees Retirement System v. Betts,* 492 U.S. 158, 171, 109 S. Ct. 2854, 2863-64, 106 L. Ed. 2d 134 (1989) ("[O]f course no deference is due to agency interpretations at odds with the plain language of the statute itself."). If an insulin-dependant diabetic can control her condition with the use of insulin or a near-sighted person can correct her vision with eyeglasses or contact lenses, she cannot argue that her life is substantially limited by her condition. To say that a person who needs insulin or eyeglasses is disabled in fact is to read out of the act's first definition of disability the requirement that it applies only to those persons who are "substantially limited" in major life activities. *See Coghlan,* 851 F. Supp. at 813 (EEOC's conclusion that plaintiff's limitation be considered without regard to his use of insulin "at odds" with clear statutory language of act requiring substantial limitation).

928 F. Supp. at 1445.

Other district courts have reached opposite results. In *Sicard v. City of Sioux City,* 1996 WL 738519 (N.D. Iowa, Nov.

27, 1996), the court reached the same result as the Eleventh Circuit, concluding that the EEOC's interpretation of a "mental or physical impairment that substantially limits one or more of the major life activities of such individual," 42 U.S.C. § 12102(2), as requiring a determination without regard to mitigating measures is "certainly a permissible construction of the statute." 1996 WL 738519, at 16. The court also found that the interpretation of disabled as requiring an examination of the effects of the untreated impairment was not inconsistent with the statute's requirement of a substantial limitation on a major life activity. *Id.*

Other courts have not expressly addressed the issue, but have simply looked to an individual's medicated condition to determine whether that person is protected under the ADA. *See, e.g., Sweet v. Electronic Data Systems, Inc.*, 1996 WL 204471, at *5 (S.D.N.Y. 1996) (holding that plaintiff's eyesight was not substantially limited where his vision was perfect in one eye and correctable to 20/80 in the other eye); *Joyce v. Suffolk County*, 911 F. Supp. 92, 95 (E.D.N.Y. 1996) (holding that an applicant for position as a police officer whose uncorrected vision in each eye was 20/200, but whose corrected vision in each eye was 20/20, was not "disabled" under the ADA). Other courts reach the opposite result. *See, e.g., Canon v. Clark*, 883 F. Supp. 718, 721 (S.D. Fla. 1995) (citing 29 C.F.R. Pt. 1630 App. § 1630.2(h) and, finding that the plaintiff had stated an ADA claim, because, as alleged, her diabetes "forced [her] to rely on medical assistance to perform major life activities and to survive" and "she would "lapse into a coma without insulin"); *Pater v. Deringer Mfg. Co.*, 1995 WL 530655 (N.D. Ill. 1995) (not citing the EEOC interpretive regulations, but instead relying on cases finding that diabetes, when not medicated, was "certainly disabling and life-limiting"); *Finley v. Cowles*

Business Media, 1994 WL 273336 (S.D.N.Y. 1994) (characterizing the regulations and comparable language from the legislative history as "stat[ing] that impairments that force an individual to rely on medical assistance to perform a major life activity, or merely to survive, should be considered disabled" and concluding that the plaintiff's chronic heart disease, if untreated, rose to the level of the disability under the ADA).

Earlier cases interpret "handicap" under the Rehabilitation Act without regarding to mitigating treatment. *See, e.g., Cook v. Rhode Island Dept of Mental Health, Retardation, and Hosps.*, 10 F.3d 17, 24 (1st Cir. 1993) (on the evidence presented, "the jury reasonably could have found that, though people afflicted with morbid obesity can treat the manifestations of metabolic dysfunction by fasting or perennial under eating, the physical impairment itself — a dysfunctional metabolism — is permanent," and therefore sufficient to support a claim under the Rehabilitation Act); *Gilbert v. Frank*, 949 F.2d 637, 641 (2d Cir. 1991) (finding that kidney disease, although controllable by weekly dialysis, constituted a handicap within the meaning of § 504 of the Rehabilitation Act); *Reynolds v. Brock*, 815 F.2d 571, 573 (9th Cir. 1987) (holding that epilepsy, although controllable by medication, qualifies as a handicap under § 504 of the Rehabilitation Act); *Miles v. General Servs. Admin.*, 1995 WL 766013 (E.D. Pa. 1995) ("[A]lthough controllable with medication, [the plaintiff's] diabetes, carpal tunnel syndrome and depression, which would otherwise substantially limit his ability to perform manual tasks and to work, render plaintiff 'handicapped'" within the meaning of the Rehabilitation Act); *Liff v. Secretary of Transp.*, 1994 WL 579912 (D.D.C. 1994) (rejecting the defendant's argument "that because plaintiff's depression is generally controlled by

medication, her impairment does not substantially limit any of her major life activities" because "Congress intended that the determination of whether an impairment substantially limits a major life activity is to be made without regarding to medication").

Against this conflict in the case law, this court examines the question presented.

V. Deference and Disability

This court agrees that the controlling issue is the extent of deference to be accorded the EEOC's interpretive guidance. The Fifth Circuit has recently summarized the standards for judicial review of an agency's interpretation of a statute that it administers:

> In the seminal case of *Chevron, U.S.A. v. Natural Resources Defense Counsel*, the Supreme Court established a two-step method. . . . In devising this framework, the *Chevron* Court relied on basic principals of democratic government: Policy choices are for the political branches, and Congress is the supreme branch for making such choices. Under *Chevron*, however, courts retain their traditional role to say "what the law is," that is, to interpret statutes.
>
> To give effect to the core democratic principle of congressional primacy, *Chevron* instructs reviewing courts first to use 'traditional tools of statutory construction' to ascertain whether 'Congress has directly spoken to the precise question at issue.' For if Congress has clearly expressed its intent in the

> plain language of the statute, 'that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' If, but only if, the language of the statute is determined to be either ambiguous or silent on the particular issue is the reviewing court to proceed to the second *Chevron* inquiry: 'whether the agency's answer is based on a permissible construction of the statute.'

Mississippi Poultry Ass'n, Inc. v. Madigan, 31 F.3d 293, 299 (5th Cir. 1994)(internal citations omitted). As the Fifth Circuit noted, the Supreme Court has expressed the threshold inquiry in *Chevron* in terms of "whether Congress has unambiguously foreclosed the interpretation offered by the agency." *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 114 S.Ct. 2223 (1994), *cited in Mississippi Poultry Ass'n, Inc.*, 31 F.3d at 299 n.36.

The ADA does not state whether a court must determine the presence of an impairment or a disability based upon an individual's treated or untreated condition. As the Fifth Circuit has already recognized, the ADA does not define either "substantially limits" or "major life activities" that a plaintiff must show, or raise a fact issue concerning, in order to assert a "disability" under the statute. *Dutcher*, 53 F.3d at 726. The statute is silent. The "precise question at issue" presented by this motion is therefore whether the EEOC's interpretive guideline, requiring that the determinations of whether an individual has an impairment that substantially limits a major life activity to be made "without regarding to mitigating measures such as medicines, or assistive or prosthetic devices," is unambiguously foreclosed by the statute's requirement that the impairment substantially limit a major life activity.

The Eleventh Circuit has directly answered this question, as follows:

> . . . there is no direct conflict between the [EEOC] interpretation contained in the appendix to the regulations and the language of the statute itself. There is nothing inherently illogical about determining the existence of a substantial limitation without regarding to mitigating measures such as medicines or assistive or prosthetic devices, and there is nothing in the language of the statue itself that rules out that approach.

Harris v. H & W Contracting Co., 102 F.3d at 521. The Eleventh Circuit rejected the argument that the EEOC's interpretation of the statute would render meaningless the statutory requirement that an impairment must substantially limit a major life activity if it is to be considered a disability. *Id. See also Sicard v. Sioux City*, 1996 WL 738519, at *16, in which the court stated:

> [T]he EEOC's interpretation does not read "substantially limits" out of the statute . . . . Rather, it places "substantially limits" in proper relation to the impairment, that is, it relates "substantially limits' to the untreated impairment. The trier of fact must still decide whether the untreated impairment "substantially limits" any major life activity before the untreated impairment constitutes a "disability" within the meaning of the ADA. For example, courts have held that untreated visual limitations may nonetheless be insufficient to constitute "disabilities" under the ADA, because the visual

limitations do not substantially limit any major life activity.

Other factors also argue in favor of according deference to the EEOC interpretive guidance. The Fifth Circuit has specifically recognized that the EEOC's regulation and guidelines "provide significant guidance" to the interpretation of the ADA disability criteria. *Dutcher v. Ingalls Shipbuilding*, 53 F.3d at 726. The interpretive guideline at issue was contained in the appendix prepared by the federal agency charged with enforcing the ADA. The guidelines were nearly contemporaneous with the passage of the statutes and have not changed since promulgation, and the regulations are directly supported by the legislative history of the statute. *See Batterton v. Francis*, 97 S.Ct. 2399, 2405 n.9 (1977) (the degree of deference due an administrative interpretation depends on "the timing and consistency of the agency's position, and the nature of its expertise"); *Rowinsky v. Bryan Independent Sch. Dist.*, 80 F.3d 1006, 1015 n. 20. ("[t]he deference accorded interpretive regulations depends on such factors as the circumstances of their promulgation, the consistency with which the agency has adhered to the position announced, the evident consideration which has gone into its formulation, and the nature of the agency's expertise"). As one court has noted, the EEOC's interpretive guidance "directly mimic[s] the language of the House and Senate Reports in formulating the EEOC's interpretation of the statutory language." *Sicard v. City of Sioux City*, 1996 WL 738519, at *16. Three congressional reports specifically state that the disability inquiry is to be made without regard to the ameliorative effects of medication or other devices. H.R. REP. No. 101-485(II), 101st Cong., 2nd Sess., 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445; H.R. REP. No. 101-485 (III), 101st Cong., 2nd Sess. 28 (1990), *reprinted in* 1990

U.S.C.C.A.N. 445; S. REP. No. 101-116, 101st Cong., 1st Sess. 23 (1989), *reprinted in* A & P S. Rep. 101-116.[4]

HCA argues that it is inconsistent to determine whether an individual is disabled on the basis of his unmedicated condition under the first element of a *prima facie* case of disability under the ADA, and to determine whether that person is a qualified individual, the second element of a *prima facie* case, on the basis of his medicated condition. *See, e.g., Murphy v. United Parcel Service, Inc.* 1996 WL 699380, at *9-10. The ADA defines a qualified person with a disability to be "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The Eleventh Circuit found no inconsistency in determining whether a disabled individual is qualified based on actual job performance and actual job performance capabilities, and in determining the presence of a disability based on the potential effects of the lack of mitigating measures. *Harris v. H & W Contracting Company,* 102 F.3d at 519; *see also,* 29 C.F.R. Pt. 1630, App. § 1630.10 (the otherwise qualified provision "ensure[s] that there is a fit between job

4. Some courts note that legislative history is not appropriately consulted without a threshold determination that a statue is ambiguous. *See, e.g., Davis v. Michigan Dep't. of Treasury,* 109 S.Ct. 1500, 1504 (1984). However, in this case, the courts have consulted the legislative history in order to determine the deference due the agency's interpretation by evaluating the basis of the interpretation and the validity of the reasoning behind it. *Sicard v. City of Sioux City,* 1996 WL 738519, at *18; *see also Harris v. H. & W. Contracting Co.,* 102 F.3d at 521 ('[w]e cannot disregard the interpretive guidance contained in the appendix prepared by the federal agency charged with enforcing the ADA, when that guidance is based on a permissible construction of the statute and is supported by the statute's legislative history.").

criteria and an applicant's (or employee's) *actual* ability to do the job") (emphasis added).

Other courts have commented that if the existence of a disability under subpart (A) of § 12102(2) is determined without regard to an individual's medicated condition, subpart (C) of the statute becomes meaningless. Subpart (C) defines disability as "being regarded as having such an impairment." The EEOC regulations define "regarded as having an impairment" as follows:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630(2)(1). The EEOC's interpretive guidance under this section states as follows:

> An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially

> limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

29 C.F.R. Pt. 1630, App. § 1630.2(1). One court has commented that this interpretive guideline "implicitly suggest[s] that a person who has controlled his blood pressure by medication does not have a disability; if this were not so, why would a person suffering from high blood [sic] ever have to look to the 'regarded as' section of the ADA to prove the existence of a disability?" *Murphy v. UPS*, 1996 WL 699380, at *9-10.

The courts that have followed the EEOC's interpretive guidance have not directly addressed this apparent tension between the two sections of the guidelines. However, in *Harris v. H & W Contracting Company*, the Eleventh Circuit implicitly found no inconsistency between determining whether the plaintiff *actually has* a disability based on her untreated condition, and determining whether the plaintiff was *regarded as having* a disability based upon her treated condition. In *Harris*, the court first found that the plaintiff had raised a fact issue that she was disabled because of the consequences of Graves' disease without medication. The court then found that the plaintiff had raised a fact issue that the company regarding her as having a substantially limiting impairment, even if she did not. The courts have recognized that the focus of the ADA provisions and regulations on "regarded as having an impairment" is on "the impairment's effect upon the attitude

of others . . . These provisions and regulations are intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that have the effect of disadvantaging persons with, or regarded as having, disabilities." *Gordon v. Hamm & Associates,* 100 F.3d 907, 912 (11th Cir. 1996). The Seventh Circuit has observed that:

> [A]lthough at first glance peculiar, [this provision] actually makes a better fit with the elaborate preamble to the Act, in which people who have physical or mental impairments are compared to victims of racial and other invidious discrimination. Many such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.

Vande Zande v. State of Wisconsin Department of Administration, 44 F.3d 538, 541 (7th Cir. 1995), *quoted in Gordan v. Hamm & Associates,* 100 F.3d at 912. It is not "inherently illogical" to determine the existence of a substantial limitation, which focuses on the effects of the impairing condition on the plaintiff, without regard to mitigating measures, but to determine the effect of the plaintiff's condition on the attitude of others based on the difference between the plaintiff's actual capabilities in his medicated condition and how others perceived those capabilities.

Appendix B

The Fifth Circuit has analyzed the elements of disability discrimination under the ADA so as to make the EEOC interpretive guidance, which at first glance appears inconsistent with the statute, consistent. In *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155 (5th Cir. 1996), the court reviewed a summary judgment in favor of the employer. The issue in that case was whether the employee, who suffered from bipolar disorder, had raised a fact issue that he told his employer of any limitations arising out of his disability and requested his employer to make reasonable accommodations. The Fifth Circuit stated:

> For purposes of proving ADA discrimination, it is important to distinguish between an employer's knowledge of an employee's disability versus an employer's knowledge of any limitations by the employee as a result of that disability. This distinction is important because the ADA requires employers to reasonably accommodate limitations, not disabilities. . . . ("[T]he term 'discriminate' includes . . . not making reasonable accommodations to the known physical or mental *limitations* of an otherwise qualified individual with a disability . . .") (emphasis added); 29 C.F.R. 1630.9 App. (1995) ("Employers are obligated to make reasonable accommodations only to the physical or mental *limitations* resulting from the disability that is known to the employer.") (emphasis added).

93 F.3d at 164.

Under the EEOC's guidelines, whether an individual is disabled is determined without reference to mitigating

measures. Whether that individual is otherwise qualified, whether an employer must make reasonable accommodation for any limitations that result from the disability, and whether an employer has discriminated because of the disability, are separate questions, determined on the basis of the employee's actual capabilities in the work place, including the effects of medication or other mitigating treatment. *Harris,* 102 F.2d at 519; 29 C.F.R. Pt. 1630, App. § 1630.10 (the otherwise qualified provision "ensure[s] that there is a fit between job criteria and an applicant's (or employee's) *actual* ability to do the job") (emphasis added).

This court does not find that the differences between two of the three alternative bases on which a plaintiff can qualify as disabled, or the use of different standards first to determine disability, then to assess whether an individual is otherwise qualified and whether an employer has made or must make reasonable accommodation, or is discriminating on the basis of the employee's disability, are grounds for disregarding the EEOC interpretive guidance.

In this court's prior opinion granting summary judgment on the issue of whether Washington's disability caused his termination, this court stated that "Washington appears to meet the definition of 'disabled' in the ADA because he has a degenerative bone disease which, if left unmedicated, would confine him to bed rest." (Docket Entry No. 26, p. 6). In reaching this conclusion, this court pointed to the "anomaly" of labeling a man who is quite capable of working 50 hours each week in a job in his chosen profession as "disabled."[5] Other

5. This court also noted that under the EEOC guidelines, if an individual is substantially limited in other major life activities, such as

(Cont'd)

courts have pointed to similar anomalies that can result from requiring a court to determine whether a plaintiff has made a *prima facie* showing that he or she is disabled based on an unmedicated or untreated condition, rather than by examining the actual condition that the plaintiff and the employer in fact face. *Couglan,* 851 F.Supp. at 812-13; *Murphy,* 1996 WL 699380, at *9-10. However, as the courts have pointed out, as long as the interpretation made by the agency is a permissible construction of the statute, the fact that courts may prefer a different construction is not a sufficient basis for disregarding the agency's choice. *Chevron U.S.A., Inc.,* 104 S.Ct. 2778, 2782 (1984); *Mississippi Poultry Ass'n,* 31 F.3d at 299.

V. Certification for Interlocutory Appeal

Under 28 U.S.C. § 1292(b), a district court judge may certify a question for interlocutory appeal, as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals which would have jurisdiction of an appeal

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(Cont'd)
breathing and walking, that individual need not establish that he is substantially limited in his work to qualify as disabled under the statute. 29 C.F.R. 1630.2(j). The anomaly here results less from the use of the unmedicated condition to determine disability than from the fact that the limitation asserted is not only to the life activity of working.

> of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

This court finds that the determination as to whether Washington has a disability under 42 U.S.C. § 12102(2)(A) must be made without regard to the mitigating effects of the medication he takes. This finding is based on the deference required to be given to the agency's interpretive guidelines. Based on those guidelines, this court determines that Washington has presented a genuine issue of material fact that his Adult Stills Disease substantially limits major life activities.

However, this court also finds that this issue "involves a controlling question of law as to which there is substantial ground for difference of opinion," and that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). This court therefore CERTIFIES for interlocutory appeal the question of whether a court should look to the plaintiff's medicated or unmedicated condition to determine whether the plaintiff has a raised a fact issue as to the existence of a disability, as that term is defined under 29 U.S.C. § 12102(2)(A). The court orders this case STAYED until the appeal is complete.

VI. Conclusion

This court ORDERS that Washington's disability be determined with regard to his medicated condition; CERTIFIES this ruling for interlocutory appeal; and STAYS this proceeding until the interlocutory appeal is complete.

(2)

Supreme Court, U.S.
FILED
MAR 25 1999
CLERK

No. 98-1365

In The

Supreme Court of the United States

October Term, 1998

HCA HEALTH SERVICES OF TEXAS, INC.
d/b/a SPRING BRANCH MEDICAL CENTER,

Petitioner,

v.

KELVIN WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN RESPONSE TO WRIT

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3PP

QUESTION PRESENTED

Whether a court should consider an individual's mitigating measures when determining whether that individual is "disabled" under the ADA?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

STATEMENT OF THE CASE

While Respondent, Kelvin Washington, disagrees with Petitioner, HCA Health Services of Texas, Inc. d/b/a Spring Branch Medical Center's position, Respondent notes that this Court has agreed to review *Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *cert. granted*, ___ U.S. ___, 119 S. Ct. 790 (1999); *Murphy v. United Parcel Service, Inc.*, 141 F.3d 1185 (10th Cir. 1998), *cert. granted*, ___ U.S. ___, 119 S. Ct. 790 (1999); and *Albertsons, Inc. v. Kirkingburg*, 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, ___ U.S. ___, 119 S. Ct. 791 (1999), reviewing the precise issue for which the petitioner seeks certiorari in this case. In light of the fact that the Supreme Court has accepted review of this issue, Respondent respectfully requests review of this case as well since the unique facts in this case may assist in the Court's determination of the issue the Supreme Court has accepted for review. However, Respondent is in opposition to a reversal of the Court of Appeals' decision in this case.

Dated: March 26, 1999.

Respectfully submitted,

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